IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 4TH JULY 2007 / 13TH ASHADHA 1929

SA.No. 337 of 1994()

(AGAINST THE DECREE AND COMMON JUDGMENT DATED 28/09/1993 OF THE LEARNED SUB JUDGE THALASSERY IN AS.208/1992 AND 210/92 AGAINST DECREE DATED 30/6/1992 OF THE LEARNED MUNSIFF OF THALASSERY IN OS.102/1990)

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APPELLANT: 1ST RESPONDENT IN A.S.208/92 AND IN A.S.210/92- PLAINTIFF:

VADAVATHI YESHODA,
W/O. POTTAKULATHIL MAROLI NARAYANAN,
MAROLI HOUSE, P.O. PARAPRAM, PINARAYI AMSOM DESOM,
THALASSERY, DIST.KANNUR.

BY ADV. SRI.C.P.KUNJHIKANNAN
SRI.J.M.H.JOHN DAVID
SMT.VIDHYA. A.C

RESPONDENTS: APPELLANT RESONDENTS 2 TO 5 IN A.S.208/92 ANDAS.45 RESPONDENTS AND APPELLANT IN A.S.210/92 -DEFENDANTS 1 TO 5:

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1. **VADAVATHI KUMARAN, S/O.KRISHNAN,**
   ARAYAL KUNIYIL HOUSE, P.O. PARAPRAM,
   PINARAYI AMSOM DESOM, THALASSERY, DIST.KANNUR.

2. **VADAVATHI KALLIANI, D/O.KRISHNAN,**
   KUNNUMBRATH HOUSE, P.O.PINARAYI,
   THALASSERY, DIST. KANNUR.

3. **VADAVATHI GOPALAN, S/O.KRISHNAN,**
   PINARAYI AMSOM DESOM, THALASSERY, DIST. KANNUR.

4. **VADAVATHI SARADA, D/O.KRISHNAN,**
   NEW NAYAPALAM, POST VELLIVAYAL CHAVADY,
   MANALI (VIA) NEW TOWN, MADRAS – 600 103, TAMIL NADU.

5. **VADAVATHI RADHA, W/O.BALAN,**
   KUNNUMPURATH HOUSE, P.O.PINARAYI,
   THALASSERY, DIST. KANNUR.

BY ADV. SRI.T.A.RAMADASAN for R1

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 04/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

S.A.NO.337/1994

ORDER ON C.M.P.NO.626/1994 IN S.A.NO.337/1994

DISMISSED

04/07/2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

KSS

M.SASIDHARAN NAMBIAR,J.

S.A.NO.337 OF 1994

Dated 4th July 2007

J U D G M E N T

Plaintiff in O.S.102 of 1990 on the file of Munsiff court, Thalassery is the appellant. Defendants are respondents. Appellant instituted the suit seeking a decree for partition and allotment of her separate share. Plaint schedule property admittedly originally belonged to Paloran Krishnan as per registered marupat of 1945. On the death of Krishnan it devolved on his wife and children. Cheeru, the widow died in 1981. Plaintiffs and defendants 1 to 5 and deceased Kallu are their children. Appellant is seeking partition and separation of her one share contending that on the death of Kallu who was unmarried her right also devolved on others and therefore she is entitled to one out of six shares. First respondent contested the suit. According to first respondent after the death of Krishnan, his legal heirs under Ext.B2 assignment deed in 1958 sold the property in favour of Vadakke Puthan Veettil Krishnan Nair and later under

Ext.B1 it was purchased by first respondent and therefore appellant is not entitled to claim any share. It was also contended that though appellant did not execute Ext.B2 sale deed, it was sold for her maintenance also and therefore it is binding on the appellant. First respondent further contended that in any case right of appellant is lost by the ouster, adverse possession and limitation. 5th respondent filed a written statement admitting plaint allegation and claiming a share contending that Ext.B2 sale deed is not binding on her.

2. Learned Munsiff on the evidence of PW1, Dws.1 and 2 and Exts.A1 to A3 and Exts.B1 to B3 held that as appellant was not a party to Ext.B2 assignment deed, her right was not purchased by Krishnan Nair and appellant is a co-owner along with first respondent the assignee from Krishnan Nair and her right is not barred by ouster and adverse possession. A preliminary decree for partition was passed holding that appellant is entitled to one share and defendants 2 to 5 are not entitled to any share and first respondent is entitled to the remaining five shares.

3. First respondent challenged decree and judgment before Sub court, Thalassery in A.S.208 of 1992. 5th

defendant challenged the preliminary decree refusing to grant a share to her, in A.S.210 of 1992. Learned Sub Judge heard both appeals together. On re-appreciation of evidence it was found that under Ext.B3 partition deed properties available for partition. were divided in 1963 and evidence establish that appellant was ousted from possession and therefore she is not entitled to a share. Preliminary decree granted by trial court was set aside and suit was dismissed. It is challenged in second appeal.

4. Second appeal was admitted formulating following substantial questions of law.

> 1) Whether first respondent can claim more right than what he obtained under Ext.B1 and Ext.B2.
>
> 2) Whether in the light of the evidence, findings of first appellant court that right of appellant is lost by ouster, adverse possession and limitation is sustainable.

5. Arguments of learned counsel appearing for appellant were that there is no evidence to prove that there was an ouster and though under Ext.B3, the remaining properties were partitioned, there is nothing in Ext.B1 to show that they are the only properties to be divided and

therefore Ext.B3 will not operate as an ouster and on the evidence first appellate court should not have held that right of appellant was lost by adverse possession. Learned counsel appearing for first respondent argued that when in 1963 legal heirs of deceased Krishnan and Cheeru, divided the properties available for partition and it is not mentioned in Ext.B3 that any property is kept common, it is to be presumed that all properties to be divided were divided between the sharers and therefore in the light of Ext.B3 appellant is not entitled to contend that she continued in joint possession of the property with first respondent. It was also argued that legal heirs of deceased Krishnan lost possession of the property in 1958, under Ext.B2 and possession of first respondent under Ext.B1 cannot be for and on behalf of appellant and hence first appellate court rightly held that title of appellant was lost by ouster, adverse possession and limitation and there is no reason to interfere with decree and judgment passed by first appellate court. It was also argued that first respondent obtained purchase certificate from Land Tribunal in his own name and he has been in possession of the property paying property tax as evidenced by receipts produced and therefore findings of

first appellate court is perfectly correct.

6. Right of the appellant as legal heir of deceased Krishnan is not disputed. Though under Ext.B2 Cheeru, the widow for herself and for and on behalf of minors along with first respondent son transfered their right to Krishnan Nair, rights of appellant is unaffected by Ext.B2. Ext.B2 was not executed by appellant. Admittedly she was a major at that time. Ext.B2 specifically shows that right of the appellant as legal heir of deceased Krishnan was recognised. Only the shares of the widow and minors and first respondent who are executants in Ext.B2 were transferred in favour of Krishnan Nair. It is that right which was later purchased by first respondent under Ext.B1. Therefore, first respondent could claim only the right which was available to Krishnan Nair under Ext.B2. Even if, appellant was an outsider which he is not being an assignee of Krishnan Nair, he cannot claim better right than what Krishnan Nair obtained under Ext.B2. When Ext.B2 itself recognises the right of appellant neither Ext.B2 nor Ext.B1 could operate as ouster of the rights of appellant over the property.

7. Learned Additional District Judge upheld the claim for adverse possession and limitation holding that

under Ext.B3 partition deed co-ownership properties were divided in 1963 and thereafter appellant is not in possession of the property and possession of first respondent thereafter could not be taken as for and on behalf of the appellant and therefore it amount to ouster and thereby appellant lost his rights. Relying on Ext.B5 series of tax receipts and Ext.B4 purchase certificate obtained by first respondent, first appellate court held that possession of first respondent cannot be for appellant and first respondent has been in possession of the property on his independent right asserting his title and therefore it amounts to ouster.

8. Unfortunately, first appellate court has not decided the question on the settled legal principles. Possession of a co-owner ordinarily could only be on behalf of co-owners also. By keeping in possession of the property for any number of years, possessing co-owner cannot contend that the right of he non possessing co-owner is lost by adverse possession. To constitute adverse possession by one co-owner against the non possessing co-owner, there should be clear and conclusive evidence with regard to ouster of the rights of the non possessing co-owner. In law, possession of one co-owner is

considered, possession of all co-owners. Co-owner in possession cannot render his possession adverse to other co-owners not in possession, merely by secret hostile animus on his own part in derogation of the other co-owners' title. Settled law is that as between co-owners, there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one co-owner to the knowledge of the other so as to constitute ouster.

9. As stated earlier Ext.B2 recognises right of appellant as one of the co-owners. Therefore, possession of Krishnan Nair as an assignee under Ext.B2, could only be as one of the co-owners. That possession could only be for and on behalf of the appellant also. It is more so, when Ext.B2 specifically recognises the right of appellant. First respondent being the assignee under Ext.B1 who is the brother of the appellant cannot be heard to contend that he was unaware of the rights of appellant, which remained intact under Ext.B2 as she did not transfer her right under Ext.B2. In fact Ext.B2 assignment deed was executed recognising that right. When under Ext.B1 first respondent purchased the rights of Krishnan Nair, the assignee under Ext.B2, his possession

thereafter could only be as one of co-owners, along with the appellant. Therefore, possession of first respondent subsequent to Ext.B1 for any number of years by itself will not constitute ouster. So also fact that under Ext.B4 purchase certificate first respondent obtained jenm right from the Land Tribunal will not give him absolute right over the property as the purchase certificate was obtained on the strength of the registered marupat obtained by Krishnan devolved on his widow and children and purchased under Ext.B2 and later transfered under Ext.B1 in his favour. Therefore, Ext.B4 purchase certificate shall enure to the appellant also. Similarly payment of tax by one co-owner will not by itself constitute either ouster or adverse possession.

10. Then the only question is whether the division of properties under Ext.B3, being the properties inherited from Krishnan, the father would tantamount to an ouster. True, and if Ext.B3 partition deed contained a recital to the effect that all the properties left behind by krishnan and devolved on the legal heirs were divided, it could have been said that thereafter there was no co-ownership property and possession of first respondent subsequent to Ext.B3 cannot be for and on behalf of appellant. The fact

that plaint schedule property was not included or divided under Ext.B3 by itself will not constitute ouster. Similarly, if Ext.B3 contains a recital that apart from the properties divided thereunder, they are not in possession of any other property to be divided or in their joint possession it may amount to ouster. On scanning through all the recitals in Ext.B3, it is absolutely clear that there is no such recital. Ext.B3 only trace out the title inherited from the father in respect of the properties divided thereunder. There is no mention in Ext.B3 that father did not leave behind any other property than what was divided thereunder. There is no recital that apart from the properties divided under Ext.B3, no other property is in the joint possession of the co-owners. Therefore, fact that plaint schedule property was not included in Ext.B3 is not a sufficient reason to hold that there was an ouster of appellant of her right in the plaint schedule property. If that be so, finding of first appellate court that rights of appellant is barred by adverse possession amounting to ouster is unsustainable. The fact that explanation of appellant for not including plaint schedule property in Ext.B3 is not satisfactory is not a ground to hold that Ext.B3 establish

ouster. There is absolutely no evidence to prove that first respondent at any point of time asserted his independent right to the knowledge of appellant that she has no right over plaint schedule property or that he is in possession of plaint schedule property only on his behalf and not on behalf of the appellant. When Ext.B2 recognises the rights of appellant and that right was purchased under Ext.B1, possession of first respondent thereafter could only be for and on behalf of the appellant also. In the absence of evidence to prove ouster to the knowledge of the appellant, her title was not lost by adverse possession as found by first appellate court. Therefore, appellant is entitled to get her share as found by the trial court.

11. Appeal is allowed. Decree and judgment passed by Sub court, Thalassery in A.S.208 of 1992 is set aside. Preliminary decree and judgment passed by Munsiff court, Thalassery in O.S.102 of 1990 is restored.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.337 OF 1994

4th JULY 2007

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